No. 02-94

Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

In The

Supreme Court of the United States

WILLIAM OVERTON, Director of
Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DEBORAH LABELLE
(*Counsel of Record*)
221 North Main Street, Suite 300
Ann Arbor, Michigan 48104
Telephone: (734) 996-5620

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Where prison officials had no legitimate penological interest in prohibiting non-contact visits with minor siblings, nieces and nephews of prisoners, restricting non-contact visits with prisoners' children, and placing permanent visitation bans on prisoners who had two substance abuse misconducts, and where the permanent bans were imposed capriciously and with no reviewable standards, did the lower courts properly hold that the restrictions on non-contact visits with minor family members improperly infringed on prisoners' First Amendment rights, and the permanent ban improperly infringed on the prisoners' First, Eighth and Fourteenth Amendment rights?

PARTIES TO THE PROCEEDING

Respondents do not dispute Petitioners' designation of parties.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	7
I. THE CIRCUIT COURT CORRECTLY HELD THAT PRISONERS RETAIN A FIRST AMENDMENT RIGHT TO ASSOCIATION ENTITLING THEM TO REASONABLE NON-CONTACT VISITATION WITH THEIR FAMILIES UNLESS SUCH VISITATION INTERFERES WITH SOME VALID PENOLOGICAL OBJECTIVE AND FURTHER CORRECTLY FOUND THE POLICY, AS APPLIED BY MDOC, OF PERMANENTLY RESTRICTING VISITATION FOR INMATES WHO HAVE RECEIVED TWO SUBSTANCE ABUSE MISCONDUCT CITATIONS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION	7
A. First Amendment	7
1. Non-contact visits for minor family members	11
2. Permanent ban	13
B. Eighth and Fourteenth Amendments	16

TABLE OF CONTENTS – Continued

Page

II. THE CIRCUIT COURT DECISION FOLLOWS THE PRECEDENT OF THIS COURT AND PRESENTS NO CONFLICT WITH OTHER CIRCUITS WHICH HAVE SIMILARLY ADHERED TO THIS COURTS' RULINGS THAT THE CONSTITUTIONAL RIGHTS OF PRISONERS MAY BE PROPERLY LIMITED TO ACCOMPLISH VALID PENOLOGICAL OBJECTIVES 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Almond v. Kent, 459 F.2d 200 (4th Cir. 1972) 26

Aristotle P. v. Johnson, 721 F. Supp. 1002 (N.D. Ill. 1989) 12

Bazzetta v. McGinnis, 902 F. Supp. 765 (E.D. Mich. 1995) 4

Bazzetta v. McGinnis, 124 F.3d 774 (6th Cir. 1997) 4, 9

Bazzetta v. McGinnis, 133 F.3d 382 (6th Cir. 1998), *cert. denied*, 524 U.S. 953 (1998) 4

Bazzetta v. McGinnis, 148 F. Supp. 2d 813 (E.D. Mich. 2001) ..... *passim*

Bazzetta v. McGinnis, 286 F.3d 311 (6th Cir. 2002) ..... *passim*

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 12

Bell v. Wolfish, 441 U.S. 520 (1979) 15

Bellamy v. Bradley, 729 F.2d 416 (6th Cir. 1984) 10

Berry v. Brady, 192 F.3d 504 (5th Cir. 1999) 25

Block v. Rutherford, 468 U.S. 576 (1984) 10

Buie v. Jones, 717 F.2d 925 (4th Cir. 1983) 23, 26

Carabello-Sandoval v. Honsted, 35 F.3d 521 (11th Cir. 1994) 23

Evans v. Johnson, 808 F.2d 1427 (11th Cir. 1987) 23

Farmer v. Brennan, 511 U.S. 825 (1994) 16

Feeley v. Sampson, 570 F.2d 264 (1st Cir. 1978) 26

Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) 24, 25

TABLE OF AUTHORITIES – Continued

Page

Jones v. North Carolina Prisoners' Union, 439 U.S. 119 (1977) 24

Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989) 10, 17, 22, 24

Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) 26

Lynott v. Henderson, 610 F.2d 340 (5th Cir. 1980) 22

Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989) 23

McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975) 22

Meyer v. Nebraska, 262 U.S. 390 (1923) 8

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 8

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 11, 12, 23

Olim v. Wakenekona, 461 U.S. 238 (1983) 11

Pell v. Procunier, 417 U.S. 817 (1974) 9, 15, 24

Peterson v. Shanks, 149 F.3d 1140 (10th Cir. 1998) 23

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 8

Procunier v. Martinez, 416 U.S. 396 (1974) 25

Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) 22

Roberts v. United States Jaycees, 468 U.S. 607 (1984) 8

Sandin v. Connor, 515 U.S. 472 (1995) 17

Santosky v. Kramer, 455 U.S. 745 (1982) 8

Shaw v. Murphy, 532 U.S. 223 (2001) 9

Smith v. Coughlin, 748 F.2d 783 (2d Cir. 1984) 23

TABLE OF AUTHORITIES – Continued

Page

Smith v. McDonald, 869 F. Supp. 918 (D. Kan. 1994) 12

Spear v. Sowders, 71 F.3d 626 (6th Cir. 1995) 10

Thomas v. Brierley, 481 F.2d 660 (3d Cir. 1973) 26

Thornburgh v. Abbott, 490 U.S. 401 (1989) 9, 24

Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985) 22

Troxel v. Granville, 530 U.S. 57 (2000) 11, 12, 13

Turner v. Safley, 482 U.S. 78 (1987) ..... *passim*

Valentine v. Englehardt, 474 F. Supp. 294 (D.N.Y. 1979) 26

White v. Keller, 588 F.2d 913 (4th Cir. 1978) 22, 23

CONSTITUTIONAL PROVISIONS

First Amendment ..... *passim*

Eighth Amendment 5, 16, 26

Fourteenth Amendment 4, 8, 11, 15

STATUTES

28 U.S.C. §1254(1) 1

JURISDICTION

Respondents do not dispute this Court's jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Over the last decade, prison expansion in Michigan resulted in double bunking most prisons, grafting additions onto existing facilities and increasing facility populations beyond their intended capacities. Yet even when the population of a facility doubled or tripled, visiting rooms were not enlarged. App. at 35. By 1994, the Michigan Department of Corrections (hereinafter "Defendants") identified a problem with visitor overcrowding. Plaintiffs, a certified class of Michigan prisoners and members of the public who wish to visit Michigan prisoners, are directly affected by these changes.

Responding to the problem, Defendants began by limiting the number of visits allowed each prisoner per month, the number of visitors allowed on each visit, and the number of individuals who can appear on each prisoner's pre-approved visitor list. App. at 36. Plaintiffs did not challenge these rules.

The department also created restrictions that prohibited or limited visits by whole categories of individuals. While Plaintiffs did not challenge Defendants' ability to restrict visits by minors unrelated to the prisoner, they did challenge several policy revisions that severely impacted

family visitation.[1] One prohibited all children under age eighteen (18) from visiting incarcerated family members unless they were the child, step-child or grandchild of the prisoner. This prevented all visits between prisoners and their minor brothers, sisters, nieces and nephews. A second rule prohibited a prisoner's own biological child from visiting if the prisoner had voluntarily terminated parental rights to promote the child's best interest, *e.g.*, to permit adoption by another family member. Under a third rule change, a prisoner's child could only be brought to visit by an immediate family member (defined by Defendants to exclude aunts, uncles, and the parent of the child if unmarried to the prisoner), or legal guardian. This prevented visits by children when the adults available to accompany the child were extended family members, close family friends, and even social workers. A fourth rule barred former prisoners from visiting, regardless of how long they had been law-abiding members of the community. These changes resulted in decreasing visits by fifty percent, well exceeding Defendants' goal of a ten to fifteen percent reduction. App. at 38-39.

The final visiting rule change challenged by Plaintiffs was not designed to remedy overcrowding but to impose

[1] In their petition, Defendants discuss an incident involving one child being molested in a Michigan prison visiting room in 1994. An internal investigation concluded that the department's failure to enforce existing department rules permitted that incident to occur. App. at 63-64. The child was brought by its mother for a contact visit with a stranger who had a known history of child molestation and was supposed to be restricted to non-contact visits. This incident is irrelevant to the non-contact visits by prisoners' children, brothers, sisters, nieces and nephews that are at issue here.

punishment. That rule provided for a permanent prohibition of all visits, except those from attorneys or clergy, to any prisoner found guilty of two misconducts involving substance abuse. Such misconducts include possession of prison-made alcohol, failing or being unable to complete an urine test, and being in possession of prescription medications contrary to institutional rules, as well as illegal drug use, possession and smuggling. While Defendants attempt to characterize the rule as a minimum two-year restriction on visits, the rules and policies specifically provide for a *permanent* restriction on all visitation and contain no restoration criteria. And though the rule required the director's approval of each permanent ban, in practice they were intended to be automatic. As of May 2000, over eleven hundred prisoners were on a permanent visitation ban as a result of the 1995 policy. App. at 177, 187.

Plaintiffs did not challenge Defendants' right to restrict particular visitors for violating visiting rules or to punish prisoners who committed visit-related misconduct, such as drug smuggling, by restricting all their visits for some period of time. Nor did Plaintiffs challenge restrictions to non-contact visits that are routinely imposed for security reasons. Plaintiffs challenged the permanent ban on all visits, for one particular type of misconduct not related to visits, which resulted in prisoners being unable to see their parents, siblings, spouses and children for years on end.

The district court first addressed the restrictions on minors and former prisoners when it denied Plaintiffs' request for a preliminary injunction and dismissed Plaintiffs' challenge to these restrictions. The district court did not address the challenge to the permanent visitation ban

at that time because it was not ripe for adjudication. *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995).

On appeal from this initial ruling, the circuit court analyzed the impact of the rules on Plaintiffs' constitutional rights pursuant to the four-prong test set forth in *Turner v. Safley*, 482 U.S. 78 (1987). It concluded that the limits on *contact* visits for certain visitors were reasonably related to legitimate penological interests and did not impermissibly infringe Plaintiffs' constitutional rights. *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). The circuit court also did not address the challenge to the permanent ban. The circuit court issued a Supplemental Opinion to clarify that its ruling applied only to the restrictions on contact visits. *Bazzetta v. McGinnis,* 133 F.3d 382 (6th Cir. 1998). Plaintiffs' Petition for Certiorari was denied. *Bazzetta v. McGinnis*, 524 U.S. 953 (1998).

The case was reinstated to address the permanent visitation ban for substance abuse misconducts and the ban on visits by minor family members and former prisoners. After a two-week trial, the district court issued an opinion finding multiple constitutional violations. Applying *Turner*, the district court specifically held that prohibiting all visits with minor siblings, nieces, and nephews, former prisoners, and the biological children of prisoners who had voluntarily terminated their parental rights, violates Plaintiffs' First Amendment associational rights. The district court further found that Defendants' rules permanently restricting all visits, except those by attorneys and clergy, to prisoners found guilty of two substance abuse misconducts were uniquely draconian in both substance and implementation and violated Plaintiffs' First Amendment associational rights, Fourteenth

Amendment due process rights, and the Eighth Amendment prohibition against cruel and unusual punishment. *Bazzetta v. McGinnis,* 148 F. Supp. 2d 813 (E.D. Mich. 2001). The district court concluded:

> Even under the most deferential review, these restrictions are not reasonably related to legitimate penological interests. The Court finds in favor of Plaintiffs on all claims.

Bazzetta, 148 F. Supp. 2d at 858.

The circuit court granted Defendants a temporary stay. However, a unanimous panel ultimately affirmed the district court's findings of fact and conclusions of law in their entirety. App. at 5-23.

In affirming, the Sixth Circuit Court of Appeals applied *Turner, supra,* and found that the prohibition on visits by minor relatives was an exaggerated response to security and visiting space considerations, that it was not reasonably related to any legitimate penological goals, and that alternative methods of maintaining family relationships were inadequate. The circuit court made similar findings regarding the other restrictions on categories of visitors. App. at 5-23.

In striking down the permanent ban on visits to prisoners with two substance abuse misconducts, the circuit court made several findings. It found "[t]his harsh and arbitrary ban does not meet even the forgiving *Turner* standard." It characterized the ban as "an extremely harsh measure" that "far exceeds punishments meted out by any other state prison system for comparable violations," noting that the harm done to prisoners "should be clear to any prison official minimally concerned with prisoners'

welfare." App. at 20-21. The circuit court further found that:

> [T]he department has imposed visitation bans capriciously and according to no reviewable standards.

App. at 19. The circuit court then concluded:

> Under our constitution, even those lawfully imprisoned for serious crimes retain some basic constitutional rights. Instead of crafting policies that would legitimately meet the very real need to maintain order in prisons, the department has implemented a series of haphazard policies that violated these rights and did real harm to inmates in its care. It then defended these policies not with reasoned arguments, but with misdirection and demands that federal courts blindly defer to corrections officials. Prison officials have great leeway to govern prisons and prisoners as they see fit, if they can provide even a modicum of proof that a particular policy is desirable and serves legitimate ends. Here, as Judge Edmunds found in the case below, the department was unable to offer any convincing justification for its policies.

App. at 23.

On May 2, 2002, the circuit court panel unanimously denied Defendants' request to stay the mandate pending filing a petition for writ of certiorari to this Court. Defendants filed an Application for Recall and Stay of Mandate of the United States Court of Appeals for the Circuit Court and for Stay of the Judgment of the United States District Court for the Eastern District of Michigan Pending Certiorari on May 7, 2002 which was denied on May 16, 2002.

Thereafter the district court entered an Order of Compliance, enforcing its judgment and requiring Defendants to begin approving non-contact visitation for previously prohibited categories of visitors. Defendants were also required to lift permanent visiting bans imposed for substance abuse. App. at 1-4. Visits have been occurring since May 16, 2002. Defendants' appeal of the Order of Compliance to the circuit court is pending.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT CORRECTLY HELD THAT PRISONERS RETAIN A FIRST AMENDMENT RIGHT TO ASSOCIATION ENTITLING THEM TO REASONABLE NON-CONTACT VISITATION WITH THEIR FAMILIES UNLESS SUCH VISITATION INTERFERES WITH SOME VALID PENOLOGICAL OBJECTIVE AND FURTHER CORRECTLY FOUND THE POLICY, AS APPLIED BY MDOC, OF PERMANENTLY RESTRICTING VISITATION FOR INMATES WHO HAVE RECEIVED TWO SUBSTANCE ABUSE MISCONDUCT CITATIONS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

A. First Amendment

Defendants assert that the ruling of the lower courts went beyond the scope of any constitutional right recognized by this Court. The circuit court addressed this assertion:

> In support of its claim that inmates retain no right of association, the department cites

> Supreme Court cases which hold that prisoners do not have a right to unfettered or contact visits. None of these cases, however, say that prisoners have no right to visitation, and several caution that they should not be read to reach such a conclusion.

App. at 9.

Visitation stems from the First and Fourteenth Amendments' protection of the right to establish and maintain family associations in order to "afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference from the state." *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925). *See also Roberts v. United States Jaycees,* 468 U.S. 607, 617-18 (1984) (our constitution provides the highest protection for the most intimate relationships); *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (the state may not interfere with familial relationships absent clear and convincing evidence of parental neglect).

Beginning with its seminal decisions in *Pierce* and *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court has repeatedly reaffirmed the principle that the Fourteenth Amendment's due process clause presumptively prohibits the government from interfering with familial relationships. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("choices about marriage, family life and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect").

Incarceration does not eliminate the constitutional rights of inmates or their non-prisoner relatives across the board. Incarceration instead *qualifies* those rights such that the right can be curtailed if the right interferes with a legitimate penological objective. *Turner v. Safley, supra,* at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Pell v. Procunier,* 417 U.S. 817, 822-823 (1974) ("a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"); *Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (prisoners retain various constitutional rights, including "certain protections of the First Amendment").

This Court has expressly held that the First Amendment rights retained by prisoners include the rights of familial or intimate association exercised through marriage and visitation while continuing to caution that those rights are necessarily limited by valid security concerns and the realities of prison life. *Turner, supra,* at 84 (the right to marry, although subject to substantial restrictions as a result of incarceration, is retained); *Thornburgh v. Abbott,* 490 U.S. 401, 407 (1989) ("access [to prisons] is essential . . . to families and friends of prisoners who seek to sustain relationships with them").

Plaintiffs freely concede that even the fundamental freedom to maintain the integrity of one's family through visitation must be qualified by the prison officials' need to maintain security and order within the prison. In this sense, visitation rights can never be "absolute" or "unfettered." *See, e.g., Bazzetta v. McGinnis*, 124 F.3d 774, 779

(6th Cir. 1998) ("there is no inherent, *absolute* constitutional right to *contact* visits with prisoners") (emphasis added); *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) ("it is clear that a prisoner does not have a due process right to *unfettered* visitation") (emphasis added); *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) ("Prison inmates have no *absolute* constitutional right to visitation") (emphasis added).

However, it does not follow from the absence of an "unfettered" or "absolute" right to visitation that prisoners have "no right to visitation" even when security considerations are absent. This Court has consistently evaluated restrictions on prison visitation with the recognition that although visitation was not an absolute right, restrictions on visitation must be evaluated in light of the scope of the restriction and penological objective. *Block v. Rutherford*, 468 U.S. 576 (1984) (pre-*Turner* ruling upheld restrictions on *contact* visits for pre-trial detainees since no "absolute constitutional right to contact visits").

Defendants' reliance on *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) for the proposition that a ban on all visits does not implicate any First Amendment rights ignores the factual context of that decision and wrenches the stated principles from their moorings. In *Thompson*, this Court limited its holding to a restriction on contact visits with specific individual visitors, stating:

> This case involves the denial of prison access to particular visitors, not a general ban on all prison visitation. Nothing in the court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the due process clause in a way that the precise and individualized restrictions here do not.

(Concurring opinion at 565).[2]

The circuit court's ruling in this case followed established, clear and longstanding precedent on the proper way to balance the constitutional rights of incarcerated people with the valid needs and objectives of prison administrators. The only things unique in this case is the haphazard way a former director of the department instituted destructive policies without any rational explanation at trial. App. 57, 59, 65, 66.

1. Non-contact visits for minor family members

In addition to their general assertions about prisoners' First Amendment rights, Defendants seek to justify prohibiting all visits from prisoners' minor siblings, nieces and nephews by relying upon *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) and *Troxel v. Granville*, 530 U.S. 57 (2000). Defendants argue that any rights Plaintiffs retain under the First and Fourteenth Amendments should be limited to grandparents, parents,

---

[2] Defendants' reliance on *Olim v. Wakenekona*, 461 U.S. 238 (1983) is also misplaced. In this pre-*Turner* decision, the Court did not address prison rules restricting family visitation. Rather, it refused to block transfers of prisoners to distant facilities because of the incidental impact such rules may have on prospective visitors who lack the resources to travel.

children and grandchildren. However, the cases themselves reject this narrow view of family relationships. As Justice Powell observed in *Moore, supra,* at 504-505:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

(Plurality Opinion).[3]

Although the facts of *Troxel* involved the state's ability to require a parent to permit grandparents visitation, eight Justices agreed that the interests of the parents in the care, custody and control of their children is a fundamental constitutional right as the child is not a "mere creature of the state." *Troxel* held that "so long as a parent adequately cares for his or her children (*i.e.,* is fit), there

[3] The flaw of East Cleveland's zoning ordinance was precisely that "it selects certain categories of relatives who may live together and declares that others may not." *Id.* at 489-99. In this respect, East Cleveland's ordinance resembles Defendants' visitation policy, which selects certain categories of relatives who may visit together and declares that others may not. *See also Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1007-08 (N.D. Ill. 1989) (holding that Illinois' policy of separating siblings and placing them in separate foster homes while denying them the right to visit each other burdens fundamental right of familial association and must be subjected to heightened scrutiny); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1246 (7th Cir. 1984) (state statute which severs relationships between siblings should be stricken as burden on fundamental right of familial association); *Smith v. McDonald*, 869 F. Supp. 918, 919 (D. Kan, 1994) ("the court would carefully scrutinize a policy which created a blanket prohibition on visitation by minors.")

will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*, 530 U.S. at 65-66. By suggesting that it is up to parents to decide whether their children should see their incarcerated brothers, sisters, aunts and uncles, *Troxel* supports the circuit court's ruling that this is not a decision for prison administrators. *Troxel* does not, as Defendants contend, stand for the proposition that rights of familial association are limited to the parent-child relationship.

Defendants cite no instance in which a court has upheld a general prohibition on visits by family members remotely like Defendants' own. The reason, as the courts below found, is that the rule burdens the fundamental rights of both inmates and their visitors without serving any legitimate penological objective or advancing prison security.

2. Permanent ban

The policy that provided for the permanent elimination of all visits (except by attorneys and clergy) for prisoners who have received two misconducts for substance abuse was also found to violate the First Amendment. The circuit court, in striking down the ban, noted:

> The department has described the year ban as a two year ban, but in fact it is a permanent ban that may be removed after two years. Nor is it continued only for serious infractions; as the district court determined that the department has turned "permanent restrictions for substance abuse ... into a tool for general behavior management, where restrictions are routinely

> continued on the basis of behavior for which policy does not authorize a visitation restriction for in the first place".

Bazzetta v. McGinnis, 286 F.3d 311, 322 (6th Cir. 2002), quoting *Bazzetta*, 148 F. Supp. 2d at 844.

On its face, the rule set up a presumption that visits will never be restored, regardless of the length of the prisoner's sentence. The burden is on the prisoner to seek restoration, with no criteria for decision making. The department's rules on substance abuse misconduct do not only include possessing, using and smuggling illegal drugs, and refusing to take drug tests, but also possession and use of prison-brewed alcohol and misuse of prescription medications. Approximately twenty-five percent of all substance abuse misconducts involved alcohol. Contrary to the suggestion of the *Amicus* Brief that the Michigan rule is necessary to address the "intractable and perplexing problem" of illegal drugs being introduced into prisons (*Amicus* Brief at 7), the rule was in fact far broader in scope.

The testimony established that this unique and extraordinarily harsh punishment had a devastating effect on prisoners and their families. Because it barred parents, spouses and the prisoner's own children, it had broad impact on Plaintiffs' family association. The rule was also fraught with difficulties involving selective and arbitrary enforcement that led the circuit court to conclude:

> In practice, as the district court amply documented, the department has imposed visitation bans capriciously and according to no reviewable standards.

Bazzetta, 286 F.3d at 321-322.

Although prison officials are entitled to deference in their administration of prisons, this deference is only afforded "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response." *Bell v. Wolfish,* 441 U.S. 520, 548 (1979). *See also Pell v. Procunier, supra*, at 827. The district court carefully applied the *Turner* test to Plaintiffs' claim that the permanent ban on visits violated Plaintiffs' First and Fourteenth Amendment rights. It assessed Defendants' claimed penological objective of limiting illegal substances in prison and found that Defendants failed to demonstrate that substance abuse was a significant problem in Michigan or that the permanent restriction rule was rationally related to addressing the problem.[4] App. 67-73, 115.

The district court found that Defendants' permanent ban on all visits was an exaggerated response to a perceived problem of substance abuse by prisoners. Defendants' policy was especially bizarre in that it targeted only those inmates who have connections to the outside world, like children or spouses, eliminating those connections through loss of visitation privileges. Prisoners with no family or friends to visit did not suffer such consequences.

The circuit court's opinion striking down this rule was based on a careful following of this Court's road map for

---

[4] A long list of penalties for substance abuse remain as do many security measures designed to deter smuggling and use. Michigan has implemented a system of random drug testing. Prisoners are subject to constant surveillance; their bodies and belongings are subject to search at any time. Visitors, who can bring no personal items into the prison, are searched before entering visiting rooms. Prisoners are strip-searched before and after every visit. On-site corrections officers and surveillance cameras strictly monitor all visits.

balancing constitutional rights of prisoners and deference to prison administrators. Defendants had adopted a policy of unprecedented severity, unique among the fifty (50) states, which strips prisoners permanently of visits with their family as punishment for misconduct having no relation to the prohibited visits. There is no dispute about the importance of maintaining family ties to a prisoner's rehabilitation. The uncontradicted testimony of experts was that this draconian restriction (1) increases inmates' drug dependency by undermining the inmates' connections to their families; (2) is contrary to the recommendations of the American Correctional Association as well as the policies of every other state presented; and (3) has no appreciable effect in decreasing substance abuse.

B. Eighth and Fourteenth Amendments

The circuit court also held that the permanent visitation ban was a uniquely cruel punishment, applied in an arbitrary and capricious manner. It found that "depriving an inmate of all visitors for a period stretching indefinitely into the future" was a fundamental deprivation, callously imposed without regard to its impact on prisoners' mental health or the destruction of familial bonds. App. at 21-22. Thus the ban met the test for determining when a prison official's actions violate the Eighth Amendment set forth in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

The circuit court further found that permanent bans are capriciously imposed according to no reviewable standards, then left in place at the discretion of prison officials who need not explain or even have reasons for their decisions. Prisoners are given no hearing before a ban is imposed and have no means of contesting arbitrary

actions. Some never even learned of the policy before losing their visits. The district court opinion contains numerous examples of bans imposed for minor infractions or despite extenuating circumstances, of bans imposed years after the last misconduct had occurred or based on two guilty findings arising from a single course of conduct, of inconsistent review practices, and of refusals to restore visits based on non-substance abuse related misconducts. *See Bazzetta,* 286 F.3d 311 n. 34-52.

In the prison setting, the state deprives an inmate of a state-created liberty interest when the state "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 484 (1995). The circuit court found that Defendants' permanent withdrawal of visitation privileges, as applied, constituted such a "atypical and significant hardship." Defendants do not appear to challenge this aspect of the Court's ruling as the question presented in their Certiorari Petition does not address the due process violations found in the implementation of the permanent ban. The sweep and duration of the prohibition – a permanent bar on *all* visitors, including family members – distinguishes it from the bar on visits from particular visitors which was held not to implicate any liberty interest in *Kentucky Dept. of Corrections v. Thompson, supra*, or the 30-day confinement in administrative segregation at issue in *Sandin*. *Sandin*, 515 U.S. at 486.

Defendants claim the circuit courts' decision striking down their use of a permanent ban on visits for two substance abuse misconducts could undermine their ability to manage security in Michigan's prisons. However, not only is there no record evidence to support this claim, it is belied by the numerous methods Defendants utilize to

deter the use and smuggling of drugs in particular and the numerous other penalties Defendants have available to punish misconduct in general.[5]

Amici claim the circuit court's decision could limit other states' ability to combat the introduction of illegal drugs into the prison setting. However, Defendants' permanent visiting restriction was so factually unique in both form and substance that *Amici's* argument is simply not supportable.

At trial, Defendants entered into evidence the visiting regulations of five other states: Florida, Ohio, Indiana, Pennsylvania and New York. (Defs' Exh. 9)[6] The district

[5] The permanent loss of visits was imposed on prisoners with two substance abuse misconducts in addition to the punishment that was imposed when each misconduct occurred. This could include loss of jobs, school and good time, being placed on "top lock" or in segregation, and being transferred to a higher security facility. Loss of visits is not used to punish any other non-visit related misconduct except escape. Yet it is "automatically" placed upon two substance abuse misconducts as minor as possessing fermented fruit juice or expired prescription medications, or not producing urine for a drug test.

[6] Defendants' exhibit stated that Defendants possessed additional policies but chose to introduce only those they deemed closest to Michigan in severity. After the submission of proposed findings, and two months after the close of proofs, Defendants moved to stay the district court's decision on two occasions, once to allow time to expand the record with other state policies and once to allow them to address the issue legislatively. These requests were denied, and Defendants did not appeal those rulings. After oral argument in the circuit court, Defendants asked that Court to take judicial notice of all other state policies and procedures on visitation. Plaintiffs asserted in response that Defendants had failed to identify any rule that was as harsh as Michigan's. The circuit court advised Defendants that they could answer this assertion by way of reply brief. Defendants filed no reply and the circuit court did not grant the motion.

court reviewed each of these policies in its opinion and concluded that none was "nearly as harsh" as Michigan's, "either in duration or substantive content." App. 70. Defendants did not challenge this finding of fact on appeal.

In their Petition for Certiorari, Defendants make no claims about how Michigan's permanent visiting restriction compares to the rules of other jurisdictions. However, the *Amicus* Brief asserts that "several states have adopted similar restrictions on prison visitation", and attaches excerpts from the regulations of nineteen jurisdictions in the appendix. These jurisdictions include four that were discussed in the district court's opinion – Florida, Indiana, New York and Ohio.

Of the twenty sample regulations referenced by the *Amici* and Defendants, seven are so facially dissimilar to Michigan's as to be irrelevant to the question presented.[7] While thirteen states appear to allow loss of visits as a sanction for non-visit related rule infractions, none ban all visits permanently for the conduct at issue here.[8] The use of visiting restrictions for *no longer than six months* by such states as California, Georgia, Maryland and North Carolina supports the circuit court's finding that Michigan's permanent ban is extraordinarily punitive.

[7] Five jurisdictions (Kansas, New York, South Carolina, Tennessee, and the Federal Government) restrict visitation only for visit-related misconduct. Two jurisdictions (Indiana and Pennsylvania) place restrictions only on contact visits.

[8] Eight states appear to limit the restrictions to one year or less, many use graduated sanctions, and some exclude alcohol use as a basis for a restriction. Many rules make it clear that even for minimal restriction, hearings are provided.

It must also be noted that the excerpts presented by the *Amici* do not present a complete or accurate picture of the visitation policies of other states. While the Appendix contains bits and pieces of statutes, administrative rules and policy directives, all the policies and procedures related to visitation for each jurisdiction are not presented, nor is there evidence before this Court of how disciplinary visiting restrictions are actually enforced in the handful of states that even allow them.[9]

While this lengthy list is submitted to demonstrate the negative impact the circuit court's opinion might have on Corrections Departments around the country, upon closer inspection, that assertion quickly evaporates for several reasons. Notably, there is relatively little overlap between the eleven jurisdictions that signed the *Amicus* Brief and the twenty (including Pennsylvania from the trial exhibits) whose regulations have been represented to be similar to Michigan's. Only five states – Colorado, Idaho, Indiana, Mississippi, and New Hampshire – are both signatories and examples. Thus only these five states even assert that their own visiting regulations would be affected by the Sixth Circuit Court's decision.

[9] As is true in Michigan, state visitation policies contain numerous provisions and are subject to interpretation. For example, the *Amici* include a section of the Idaho Code that states visiting is discretionary. However, Idaho's visitation policy and rules specifically assert that visitation should be encouraged and provide for restrictions under very limited circumstances and for limited time periods ("upon a finding of guilt of a drug related DOR, no visits will be allowed for a period of six (6) months;" and only after "alternatives such as non-contact visits [are] considered prior to termination of visits"). Idaho Directive 604.02.01.001 at 9, Section 05.02.00, and at 13, Section 05.05.00.

The circuit court in the instant case had before it a record rife with arbitrary discretionary decisions applied to a broad range of behaviors. In some cases, the most severe possible penalty was imposed for relatively minor misconduct, or on especially vulnerable prisoners, or without regard to extenuating circumstances. The ad hoc imposition of sanctions outside the disciplinary process led some people to lose their visits years after their last misconduct had occurred. The total absence of reinstatement criteria, or even a consistent review process, made visit restoration decisions virtually whimsical.

This case is not about whether states in general may restrict a prisoner's visits as a disciplinary sanction for substance abuse misconducts, for a limited period of time, using fair procedures. The Michigan system was so extraordinarily harsh, so procedurally mismanaged, and so broadly applied, that it is representative only of one corrections department's experiment gone amuck. The circuit court's decision in the instant case, which carefully evaluated Defendants' permanent restrictions based on this Court's criteria, presents no threat to the operations and reasonable management decisions of departments nationwide and should be permitted to stand.

II. THE CIRCUIT COURT DECISION FOLLOWS THE PRECEDENT OF THIS COURT AND PRESENTS NO CONFLICT WITH OTHER CIRCUITS WHICH HAVE SIMILARLY ADHERED TO THIS COURTS' RULINGS THAT THE CONSTITUTIONAL RIGHTS OF PRISONERS MAY BE PROPERLY LIMITED TO ACCOMPLISH VALID PENOLOGICAL OBJECTIVES

There is no conflict among the circuits on the law or applicable standards for review of constitutional challenges to prison visitation restrictions. Nor do the cases relied upon by Defendants support their argument that the circuit court's decision in this case conflicts with those of other circuits. The cases relied upon by Defendants were either decided prior to *Turner v. Safley, supra*[10] or are

[10] Defendants and *Amici* reach back twenty years in an effort to establish a direct conflict with the circuit court's decision. These cases, despite being decided pre-*Turner* and *Kentucky*, consistently balanced the specific limitation on visitation at issue with the asserted penological objectives, as did the circuit court in this case. *Lynott v. Henderson*, 610 F.2d 340, 342-43 (5th Cir. 1980) (revocation of a visitors' privileges, for providing false information on the visiting application, was "necessary to meet legitimate penological objectives such as rehabilitation and the maintenance of security and order" and therefore did not violate prisoners' constitutional rights; *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975) (failure to permit a prisoner a conjugal visit does not violate his constitutional rights); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) (recognizing that prisoners retain those First Amendment rights, including visitation, that are not inconsistent with status as a prisoner, in approving limits on number and range of visits which are allowed for contact visits); *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985) (stating prisoners do not retain an absolute right to physical association in upholding strip searches for contact visits with prisoners who pose high security risk); *White v. Keller*, 588 F.2d 913 (4th Cir. 1978) (plaintiff denied visitation privileges for a limited period of 90 days while in

(Continued on following page)

concerned with the type of individualized restrictions on a particular visitor that are not at issue here. The circuit courts consistently recognize that visitation restrictions implicate prisoners' constitutional rights.

In various post-*Turner* rulings, the circuit courts acknowledged that prisoners' First Amendment rights were impacted by visitation restrictions and evaluated the particular restriction in light of the asserted penological objective. *Evans v. Johnson*, 808 F.2d 1427 (11th Cir. 1987) (visitation restrictions must meet legitimate penological objectives); *Carabello-Sandoval v. Honsted*, 35 F.3d 521 (11th Cir. 1994) (two-year suspension on visitation by former correctional employee who misled authorities as to her identity and was suspected of smuggling violated his rights upheld as meeting "legitimate penological objectives "); *Peterson v. Shanks*, 149 F.3d 1140 (10th Cir. 1998) (removal of prisoner who violated visiting rules from special program for enhanced visits with child upheld since right to visitation is not absolute).

Defendants also cite *Mayo v. Lane*, 867 F.2d 374 (7th Cir. 1989), a case which is particularly distinguishable on

segregation, after smuggling drugs during a visit. The *White* court noted that "the Court does not address the question of the right to familial visits, but only the right to visitation generally," admitting that the result might be different for family visits in view of the Court's decision in *Moore v. City of Cleveland, supra*.) But see a later fourth circuit case which is more on point to the facts of this case – *Buie v. Jones*, 717 F.2d 925 (4th Cir. 1983) (an absolute prohibition of visits between inmate and child is "almost certainly unconstitutional"), and *Smith v. Coughlin*, 748 F.2d 783 (2d Cir. 1984) (recognizing that prisoners retain First Amendment rights to visitation requiring a balancing with the legitimate policies of prison officials, in upholding limit on number and type of visits for prisoner on death row).

its facts. Mayo was restricted from visiting Illinois prisons because of alleged drug smuggling during visits with her grand-nephew. The court, while noting that her argument that denial of visits with one's family violated a right of association was not a frivolous argument, held that the fact that no one, including her grand-nephew, wanted her to visit, undermined her claim. The court's ruling was that Ms. Mayo had no standing to raise a constitutional claim.

Defendants also argue that the circuit court's ruling conflicts with a subsequent Ninth Circuit case finding a prison's refusal to facilitate the delivery of a prisoner's sperm to his wife for insemination did not violate any procreation rights of the prisoner. *Gerber v. Hickman,* 291 F.3d 617 (9th Cir. 2002). There is no inherent conflict in finding that one right derived from the First Amendment survives incarceration while another does not. *Turner*, for instance, holding that the ~~right of~~ marriage, while necessarily abridged, survives incarceration, is not in conflict with *Jones v. North Carolina Prisoners' Union,* 439 U.S. 119 (1977), holding that the right to organize does not.

The right to visitation and the right to procreate have radically different implications in the prison context. Visitation, far from being inconsistent with a person's status as a prisoner or with valid penological objectives, has been recognized as crucial to fulfilling the recognized goals of rehabilitation and successful return to the community. *Thornburgh v. Abbott,* 490 U.S. 401, 407 (1989) ("Access [to prisons] is essential . . . to families and friends of prisoners who seek to sustain relationships with them"); *Pell v. Procunier, supra,* at 825 (noting prison director's recognition that personal visits "aid in the rehabilitation of the inmate while not compromising the other legitimate objectives of the corrections system"); *Kentucky Dept. of*

Corrections v. Thompson, supra, at 466 (Marshall, Brennan, Stevens, JJ., quoting National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4-115, Comment (1979), in dissent); *Procunier v. Martinez,* 416 U.S. 396, 412-413 (1974) (rehabilitation of prisoners recognized as one of several valid penological objectives, along with institutional security and internal order).

To the extent that visitation is implicated in the *Gerber* decision, it is conjugal visits that are relevant to the issue of procreation, not the prohibition on contact and non-contact visits at issue here. The *Gerber* court did not dispute that prisoners retain the right to visitation in some form. Procreation, however, normally implies conjugal visits, to which courts have consistently held that prisoners have no recognized constitutional right.

There is no inconsistency between the circuit court's ruling in the instant case and the cases Defendants have cited. The latter simply reach a different result based on the extent of the visitation restriction or the nature of the penological interest involved. None of these cases addressed the sort of expansive, arbitrary, and permanent restrictions on family visits at issue here.

Lastly, Defendants argue that the circuit court's ruling, that the permanent ban on visitation for substance abuse misconducts, as applied in Michigan, constituted cruel and unusual punishment, is in conflict with a ruling from the Fifth Circuit. *Berry v. Brady,* 192 F.3d 504 (5th Cir. 1999), involved a *pro se* inmate's claim that denial of a single visit with his mother constituted cruel and unusual punishment. Reaching a different result when eleven hundred prisoners have had all their visits eliminated

permanently hardly creates a direct conflict warranting certiorari.[11]

The circuit court's decision is consistent with its own prior rulings and those of other circuits. The majority of cases cited by Defendants were specifically addressed and distinguished by the district court. Michigan simply went further than any other state in creating what the circuit court described as "a series of haphazard policies that . . . did real harm to inmates in its care," while failing to offer even a "modicum of proof that a particular policy is

[11] Numerous courts have cautioned that a visitation ban of the sort at issue here could run afoul of the Eighth Amendment. *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977) (visitation privileges may be curtailed as punishment for disciplinary infractions, but such restrictions may not be so great as to infringe upon the inmates' . . . Eighth Amendment right to be free of cruel and unusual punishment. A total denial of visits would violate [this] constitutional stricture."); *Thomas v. Brierley*, 481 F.2d 660, 661 (3d Cir. 1973) (noting that "the denial of visitation privileges without a reasonable justification might amount to cruel and unusual punishment"); *Almond v. Kent*, 459 F.2d 200, 204 (4th Cir. 1972) (complete denial of visits with wife and family while in segregation set forth an Eighth Amendment claim); *Buie v. Jones*, 717 F.2d 925 (4th Cir. 1983) (J. Murnaghaw, concurring, "Those who operate detention facilities, whether in the form of local jails or prisons, should be aware that the absolute prohibition on visitation by detainees' minor children . . . is almost certainly unconstitutional"); *Feeley v. Sampson*, 570 F.2d 264, 272 (1st Cir. 1978); *Valentine v. Englehardt*, 474 F. Supp. 294 (D.N.Y. 1979) (finding total ban on minor children visiting their parents in county jail unconstitutional).

desirable and serves legitimate ends." *Bazzetta*, 286 F.3d at 323.[12]

CONCLUSION

Petitioners have demonstrated no basis for this Court to grant certiorari. Plaintiffs-Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

DEBORAH LABELLE
Attorney for Respondents
221 North Main Street, Suite 300
Ann Arbor, Michigan 48104
Telephone: (734) 996-5620

October 7, 2002

[12] Plaintiffs challenged five sections of a visitation policy that contains dozens of restrictions. Two of the challenged policies were as a result of oversights or a failure to recognize the implications, rather than any affirmative policy of the department of corrections. App. at 43, 57, 59 (exclusion of siblings inadvertent), 65 (never thought of situation of voluntary termination of parental rights).